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No. 93-1726

In The Supreme Court of the United States

October Term, 1993

Tarrant Service Agency, Inc.,
Petitioner,

v.

American Standard Inc.,
d/b/a The Trane Company,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Circuit was correct in holding that a product may not be excluded from the relevant antitrust market solely because it has uses outside that market.

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STATEMENT OF THE CASE

Respondent American Standard Inc., d/b/a The Trane Company ("Trane"), manufactures heating, ventilating, and air conditioning ("HVAC") equipment.[1] Trane also

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[1] The common stock of American Standard Inc. is owned by ASI Holding Corporation. Seventy-three percent of ASI Holding Corporation is owned by Kelso ASI Partners, L.P., an affiliate of Kelso & Company, L.P. The remainder of the stock of ASI Holding Corporation is privately held. No stock of ASI Holding Corporation is publicly traded.

American Standard maintains interests in about 65 separate corporations for the conduct of its business throughout the world. Many of these corporations are wholly-owned, and many are not subsidiaries, but joint ventures. The only subsidiaries of American Standard with any publicly-traded shares are Sanitary Wares Mfg. Corp. (Philippines), American Standard Sanitaryware (Thailand) Public Company Ltd., and WABCO Westinghouse S.A. (France).

manufactures, and contracts with others to manufacture, replacement parts for use in servicing its equipment. Trane distributes its original HVAC equipment as well as related repair parts and repair service through more than 80 local distributors called Commercial Sales Offices ("CSOs"). In the market for original HVAC equipment, Trane competes with a number of other manufacturers such as Carrier, York, and McQuay. In the repair parts business, Trane competes with hundreds of other suppliers.

Petitioner Tarrant Service Agency, Inc. ("Tarrant") is a mail-order parts operation. Some time prior to 1987, Tarrant began to broker Trane-brand parts on a national mail-order basis. These parts were obtained from Trane CSOs. This business grew, and at some point Tarrant also began obtaining from other suppliers an increasing number of parts that were interchangeable with Trane-brand parts (called "duplicator" parts). C.A. App. 525-527 [Ex. D, Farwell Mem. at 1-2; Tr. Vol. III-B at 48-49; Tr. Vol. VI-A at 91-92].

Because of its concerns about the impact of free-riding by Tarrant and potentially others on the local efforts of the CSOs to sell Trane-brand parts, and Tarrant's unfair trade practices,[2] Trane unilaterally decided, and announced in September of 1990, that its CSOs were not to sell Trane-brand parts to "brokers" and that Trane reserved any such sales to itself. C.A. App. 295-297 [Johnson, Tr. Vol. III-A at 31-33]. Tarrant falls within Trane's definition of a broker.

After institution of the policy, Tarrant was no longer able to obtain Trane-brand parts from CSOs in the vol-

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[2] At the time it adopted the broker policy, Trane had reason to believe that Tarrant was (i) "passing off" its duplicator parts to unsuspecting customers as genuine Trane-brand parts and (ii) making false representations to its customers that its duplicator parts "meet or exceed" Trane specifications. C.A. App. 322-31 [Johnson, Tr. Vol. IV at 38-43, 48-51].

ume it desired. Tarrant therefore increased its purchases of duplicator parts from other suppliers and by the time of trial Tarrant had tripled its sales of duplicator parts. C.A. App. 222 [Baseman, Tr. Vol. V-A at 61].

Tarrant filed a complaint in January 1991 alleging that Trane's broker policy violated Section 1 of the Sherman Act. Trane denied the allegations and filed counterclaims alleging unfair trade practices. While Trane's motion for summary judgment on Tarrant's Section 1 claim was pending, this Court rendered its decision in *Eastman Kodak Co.* v. *Image Technical Service, Inc.*, —— U.S. ——, 112 S. Ct. 2072 (1992). Immediately thereafter, Tarrant amended its complaint to add a claim under Section 2 of the Sherman Act alleging that Trane was monopolizing, or attempting to monopolize, the market for parts used to repair Trane equipment. The district court granted summary judgment for Trane on the Section 1 claim on the ground that there was no evidence of a conspiracy, and scheduled Tarrant's Section 2 claim and Trane's counterclaims for trial.[3]

Tarrant's claim was "that Trane monopolized the distribution of parts for repair of Trane equipment . . .". *Tarrant Serv. Agency, Inc.* v. *American Standard, Inc., d/b/a The Trane Company*, 12 F.3d 609, 612 (6th Cir. 1993); Pet. App. at 3a. Three general categories of parts for use in repairing Trane equipment were developed at the trial. *Id.*; Pet. App. 2a-3a. One category is those parts that are marketed by Trane and its CSOs which bear the Trane brand name. The second is the so-called "duplicator" parts that "are available from a variety of manufacturers." *Id.*; Pet. App. at 3a. The third category is so-called "generic" parts. These are parts used in the repair of Trane equipment which also have other uses.

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[3] The district court did not allow Trane time to file a summary judgment motion with respect to the Section 2 claim.

These generic parts are sold both by Trane [4] and, as Tarrant concedes, by "countless" other suppliers. Petition at 6.

REASONS FOR DENYING THE PETITION

Tarrant claimed below that Trane had monopolized, or attempted to monopolize, a market defined as parts necessary to repair and maintain Trane equipment. The essence of the court of appeals' ruling is simply that Tarrant failed to produce evidence sufficient to permit a finding that Trane had a monopoly share of the relevant market, or that for any other reason Trane had monopoly power or a dangerous probability of achieving such power. The ruling is based almost entirely on the court's accurate review of the facts established by the trial record, and presents no issue for review by this Court.

In reaching its conclusion the court below rejected Tarrant's contention "that generic parts should not be included in the relevant market because generic parts, by definition, are produced and sold for different uses." 12 F.3d at 614-15; Pet. App. at 8a. This ruling was obviously correct, and Tarrant does not challenge it here. Instead, Tarrant posits, inaccurately, that the court of appeals ruled that the relevant market "must include" generic parts as a matter of law, and that this ruling must be reviewed. Petition at 2, 6. A reading of the opinion below makes it perfectly clear that Tarrant is challenging a ruling that was never made.

The decision below does not pose a substantial issue of federal law, and is not in conflict with the decisions of this Court, or with those of the courts of appeal.

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[4] Although Trane's generic parts are sold under its brand name, they have generally been classified as generic, rather than Trane-brand, parts.

I. THE DECISION BELOW DOES NOT POSE A SUBSTANTIAL FEDERAL QUESTION

Tarrant argued to the court of appeals that the relevant market should not include all parts used in repairing Trane equipment, but should instead be limited to parts that had no other uses. "Although the service and repair of [Trane] equipment may involve some generic parts as well, those parts are not peculiar to this market and should be excluded from consideration." Brief of Plaintiff-Appellant at 12. In support of this argument, Tarrant quoted language from *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956) concerning interchangeability and cited the "practical indicia" test set forth in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962). However, there was no *factual* support offered for excluding generic parts from the relevant market. The claim was that simply because these parts could be used in other equipment a jury could exclude them from the mix of parts used in repairing Trane equipment.

The Sixth Circuit properly rejected this argument and explained as follows:

> Contrary to Tarrant's contention, parts need not be peculiar to a market in order to be part of a relevant market. Although generic parts can be used for a multitude of different purposes, they can certainly be used for the same purpose of repairing Trane products. Thus, generic parts have reasonable interchangeability with Trane genuine parts for the purpose of repairing Trane equipment and are part of the relevant market.

12 F.3d at 615; Pet. App. at 8a. The Sixth Circuit did *not* hold that "the relevant market must as a matter of law include generic parts." Petition at 6. Rather, the court simply held that the fact that these parts had additional uses was not a basis for excluding them from the market, and that there was no evidentiary basis shown by the record for excluding generic parts.

There is nothing remarkable about the court's holding that generic parts are not excludable from the market simply because they have other uses. *Du Pont* teaches, for example, that cellophane is in the same product market as other flexible wrapping materials. It follows that these products compete for, among other things, the business of wrapping cigarette packages, and it is irrelevant that cellophane and the competing products have other uses.

II. THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR THE COURTS OF APPEAL

The decision below is not in conflict with decisions of this Court or the courts of appeal. None of the "practical indicia" referred to by this Court in *Brown Shoe* were proved by Tarrant to indicate that Trane's sales of generic parts were insulated from competition from other sellers of generic parts. Significantly, Tarrant cited no such evidence to the court below in connection with its citation to *Brown Shoe*. Brief for Plaintiff-Appellant at 13; Reply Brief for Plaintiff-Appellant at 11-12.

Tarrant also now argues that the decision below is in conflict with *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966), *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), *United States* v. *Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir.), *cert. denied*, 498 U.S. 920 (1990), and *California* v. *American Stores Co.*, 697 F. Supp. 1125 (C.D. Cal. 1988), *aff'd*, 872 F.2d 837 (9th Cir. 1989), *rev'd on other grounds*, 495 U.S. 271 (1990). Petition at 10-12. Each of these cases stands only for the proposition that it may be appropriate in defining the line of commerce or product market which might be impacted by a merger or acquisition to take account of only those firms that market the same package of products that are marketed by the defendant. Since Trane markets both Trane-brand and generic parts, these cases are clearly not authority for excluding generic parts

from the relevant market in this case.[5] They are, if anything, authority for including such parts.

In any event, since this argument was not made by Tarrant to the court below, none of these cases were cited to the Sixth Circuit. There is nothing in the decision that even suggests a conflict with these authorities.[6]

Tarrant also argues that the decision below "eviscerates *Kodak*". Petition at 6. Nothing could be further from the truth. The Sixth Circuit did not question that, on appropriate facts, a relevant market could be defined by the defendant's brand name.[7] This may occur, as in *Kodak*, "when the product is unique and no reasonable substitutes exist." 12 F.3d at 614; Pet. App. at 7a. In view of the duplicator parts marketed by Tarrant, Petition at 8, and many others, and the generic parts "available from a multitude of sources," *id.* at 7, it is apparent that this is not a case where a brand name defines the relevant market. Tarrant itself acknowledges this when it asserts that the non-brand duplicator parts are a part of the relevant market.

The court below took full account of *Kodak* and properly distinguished it because, in view of the competition Trane faces from duplicator and generic parts, "this case does not represent one of those circumstances where a

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[5] Tarrant's argument that prices of generic parts do not affect prices of other parts is an obvious red herring. Petition at 12. The question is whether the prices of non-Trane-brand generic parts affect the prices of Trane-brand generic parts. Tarrant produced no evidence that they do not. Generic parts cannot be excluded from the market simply because prices for, say, gaskets do not affect prices for compressors.

[6] This Court has recently observed that it should not decide an issue that "was not raised, argued, or decided below. . .". *Powell* v. *Nevada*, —— U.S. ——, 114 S. Ct. 1280, 1284 fn. (1994).

[7] It is notable that if the market were defined here to include Trane-brand parts, it would include the generic parts sold by Trane.

single product constitutes a relevant market." 12 F.3d at 614; Pet. App. at 7a.

III. THE RECORD DOES NOT SUPPORT EXCLUSION OF GENERIC PARTS FROM THE RELEVANT MARKET

There is no basis for this Court to appraise the factual record differently than did the Sixth Circuit. As plaintiff below, Tarrant bore the burden of proving a relevant market and, specifically, that generic parts should be excluded from it. *See Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 29-31 (1984). Each of Tarrant's own witnesses who testified as to the relevant market testified that generic parts are a part of that market. Tarrant's market expert, Donald Blumberg, testified that the market consisted of those parts used to repair Trane equipment including "more generalized parts rather than specific parts for the Trane product." C.A. App. 229-30 [Blumberg, Tr. Vol. II at 22-23]. Mr. Blumberg never mentioned the distinction between duplicator and generic parts which Tarrant now asserts, and certainly did not try to identify any "practical indicia" that could insulate Trane from the competition of other suppliers of generic parts.

Tarrant's other market definition witness, Joseph Grom, was even more explicit. When specifically asked whether he included generic parts in his definition, he testified as follows:

> A. It does.
>
> Q. It includes all the belts, pulleys and shafts and all that stuff we talked about this morning?
>
> A. Belts, pulleys, relays, capacitors, yeah.

C.A. App. 260 [Grom, Tr. Vol. II at 123]. Notwithstanding this testimony from its own vice-president, Tarrant argued on appeal that the market should exclude generic parts, defined as "belts, pulleys, electric motors,

electrical contractors [sic], bolts, nuts and the like." Brief for Plaintiff-Appellant at 6.

There is no evidence to support Tarrant's argument that generic parts should be excluded from the relevant market.[8] Parts used to repair Trane equipment are available from numerous sources which supply parts directly competitive with the Trane-brand parts. The service contractors and equipment owners who buy these parts are sophisticated price- and quality-conscious purchasers. There is no evidence that there is any competitive significance to the fact that some sellers of generic parts do not also sell parts that only go into Trane equipment. Petition at 6-7.[9] Trane's CSOs sell both types of parts. Tarrant itself sells some, but not all, of the generic parts used in repairing Trane equipment, as well as the duplicator parts. C.A. App. 258 [Grom, Tr. Vol. II at 113]. These sellers, and the many other suppliers of generic and duplicator parts, sell to the same buyers (service contractors and equipment owners) for the same purpose (repairing installed Trane equipment). There is vigorous competition, and Trane and its CSOs are clearly not isolated from the competition of these numerous other suppliers. *See Thurman Indus., Inc.* v. *Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1376 (9th Cir. 1989) (rejecting submarket limited to home center stores where more specialized stores provided additional competition).

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[8] Sometime during the trial, but after these witnesses had testified, Tarrant realized that it could not possibly prove its claim that Trane had a dominant market share in a market consisting of all the parts used in repairing Trane equipment. Counsel for Tarrant thereupon shifted ground and began to argue that the market should include only those parts that have no use other than the repair of Trane equipment. No effort was made to bolster this belated new claim with evidentiary support.

[9] Tarrant states there "was ample evidence in the record" to support exclusion of generic parts from the market but, significantly, no such evidence is cited. Petition at 7.

The court below also concluded that Tarrant had not proved that Trane has the power to control prices of duplicator or generic parts, or the power to prevent entry into these lines of business. 12 F.3d at 615; Pet. App. at 8a-9a. Tarrant does not challenge this ruling, and its own ability to market a line of duplicator parts directly competitive with Trane-brand parts is clear testimony as to its validity. At the time of trial, Tarrant's duplicator line of parts was up to 1,200 different parts, and its volume of sales of these parts had about trebled since 1990. As these facts show, no structural barriers to entry into the market exist. Further expansion by Tarrant and others into this business is unhindered by anything except normal competitive considerations.

IV. THE PETITION PRESENTS NO OTHER REASON FOR REVIEW BY THIS COURT

The decision below reflects nothing more than a careful review of the trial record by the court of appeals, and a conclusion based thereon that Tarrant had failed to prove the market power that was necessary for it to obtain a judgment under Section 2 of the Sherman Act. The only ruling of federal law made by the court in this factual review was that Tarrant was incorrect in contending that generic parts should be excluded from the market simply because they have additional uses. This ruling is obviously unassailable, and is not challenged here. No important issue of federal law is posed by the decision below, and no reason exists for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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